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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J.W. BIRSNER, M.D.,
RADIOLOGY NUCLEAR MEDICAL GROUP,
a Professional corporation,

Petitioners,

vs.

K. SIVALIGNHAM, M.D.;
S.K. SUNDER M.D.;
LANCASTER CARDIOLOGY MEDICAL GROUP, INC.,
a Professional Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the accusation contained in a letter, that a physician's performance is "substandard", a defamatory statement that is actionable, or is it protected speech as being a statement of opinion?

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Petitioners, J.W. Birsner, M.D. and Radiology Nuclear Medical Group, a Professional corporation, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division One, entered on September 30, 1991, and the Denial of Hearing by the Supreme Court of the State of California, entered on December 19, 1991.

OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division One, is contained in Appendix 1, et seq. of the Appendix herein. The denial of hearing by the California Supreme Court is contained in Appendix 19.

JURISDICTION

Petitioner seeks to review the decision of the Court of Appeal of the State of California, as aforesaid. Jurisdiction is invoked pursuant to Supreme Court Rule 10(c), on the basis that the decision citing first amendment protection for

alleged opinion statements is in direct contradiction to the applicable decisions of this Court.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are as follows:

Supreme Court Rule 10(c); the Constitution of the United States of America, Amendment 1.

STATEMENT OF THE CASE

For many years prior to May 20, 1988, petitioners operated the Radiology Department at Antelope Valley Hospital and did all of the thallium studies there. This was well known to respondents, who operated a rival group, The Lancaster Cardiology Medical Group, Inc., that did similar radiological studies involving the use of thallium to study heart conditions. On or about May 20, 1988, respondents sent a letter to a physician in the Lancaster area that had been using the services of petitioners. In the letter they stated, "The quality of the thallium studies done at Antelope Valley Hospital was substandard." and

that "In the matter of nuclear cardiology, the Antelope Valley Hospital's performance falls far short." This was followed by a transparent attempt to obtain the addressee's business by respondents. On or about October 24, 1988, petitioners filed a Complaint in the Los Angeles County Superior Court, alleging an action for libel per se and slander per se. After twice amending the Complaint, on or about September 15, 1989, Judge David Schacter of the Los Angeles Superior Court sustained defendants' Demurrer on the grounds set forth in the moving papers, the principal one being that the statement was one of opinion and therefore not actionable. On March 30, 1980, plaintiffs' action was dismissed, Notice of Appeal filed and the matter was later heard by the Court of Appeal of the State of California, Second Appellate District, Division One. On or about September 30, 1991, the Court of Appeal affirmed the judgment of dismissal of the court below, citing as its principal ground the language of Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, and

stated, "In this context, courts applying the constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for abuse." Following the decision of the Court of Appeal, a timely Petition for Hearing was filed with the Supreme Court of the State of California, which denied hearing on December 19, 1991.

It is contended that, under the Court's ruling in Milkovich v. Lorain Journal Co. (1990) 110 Sup.Ct. 2695, the Gertz case was modified to determine that all statements labeled opinion are not necessarily protected by the First Amendment. Here, as distinguished from Milkovich, where a newspaper was a defendant with its additional protections, under New York Times Co. v. Sullivan, 376 U.S. 254, we deal here with an economic rival of plaintiffs who, unlike Iago, "enriched themselves by stealing the good name of plaintiffs".

REASONS FOR GRANTING THE WRIT

A statement concerning a physician and his radiology department that his work is substandard is an accusation of medical malpractice, which would likely cause the average individual and especially the average physician who would refer thallium studies and other radiological procedures to plaintiffs, to believe that his work was negligent. "Substandard" is defined by Webster's New World Dictionary of the American Language as, "Below standard; specifically below a standard established by law". As is well known in questioning plaintiffs' experts in medical malpractice cases, the question is whether the performance of defendant physician fell beneath the standard of the reasonable medical practitioner in the community.

Section 45 of the California Civil Code defines "libel" as "a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule or obloquy, which causes him to be shunned or avoided or which has a

tendency to injure him in his occupation."

Section 46 of the California Civil Code defined "slander" as "a false and unprivileged publication orally uttered and also communication by radio or any mechanical or other means which: (1) charges any person with crime or with having been indicted, convicted or punished for crime ... (3) tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business, but has a natural tendency to lessen his profits".

The Court of Appeal in its opinion contended that in the context of the document there is no basis for stating that the statement concerning substandard work was other than an opinion. It is submitted that the totality of the statement would impress the individuals to whom the statement was made as being a statement of facts, not opinion, and in

any event was intended to injure plaintiffs by having the physicians remove their customer from plaintiffs and give it to defendants. In a later letter, after suit was indicated to them, defendants apologize and admit that they made an "irresponsible statement". Copies of the two letters, dated May 20, 1988 and June 8, 1988, are appended hereto as Appendix 20 et seq.

The decision by the Superior Court was made prior to this Honorable Court's decision in Milkovich and the statement of the Court of Appeal (Appendix 1) indicates that Milkovich does little to change the law enunciated in Gertz. I believe that they were incorrect in this and that there is no First Amendment protection for the statement admittedly "irresponsible" made by defendants concerning plaintiffs.

In Milkovich v. Lorain Journal Co. (1990) 110 S.Ct. 2695, the court states: "Thus, we do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion'". The court cites Restatement of Torts, Para. 566,

Comment A: "Under the law of defamation an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him".

The law of California has long been that, if expression labeled "opinion" may be either a statement of fact or opinion and therefore was ambiguous, the question must be determined by the trier of fact and not as a matter of law. See, Good Government Group v. Superior Court, 22 Cal.3d 673.

Here, charging appellant with performing substandard services for patients certainly is something that would cause third persons to refuse to deal with him. The person to whom a letter was sent was, as stated in the Complaint, a physician who had dealt with plaintiff and could have problems with malpractice suits if he dealt with a radiologist who performed "substandard" services. The term "below the standard" or "substandard" is one of the

definitions used for medical malpractice and therefore is certainly something that would harm the appellant in his profession, which is one of the definitions of defamation in the Civil Code.

Here, in the Second Amended Complaint, all of the necessary allegations are made in Para. 5 (C.T. pp.132-133), referring to Exhibit "1", a defamatory letter sent by defendant SIVALINGHAM to a client of appellants, with the intention that they damage appellants in their occupation. The allegations that the matter was stated falsely and were made according to Para. 10 (C.T. pp. 134-135) to punish appellants without a valid reason and for the purpose of wresting business appellants, adequately sets forth a cause of action for libel and for punitive damages therefrom due to malice in fact.

The second cause of action for slander sets forth the same allegations, except that the statement was made at a later date, which further indicates the intent of respondents.

In the courts of the State of Ohio, in Milkovich the holding that the reading of

the totality of the statement and its context required a finding that the statement was a matter of opinion. This Court decided in Milkovich that the statement, although possibly couched as opinion, cannot therefore eliminate the possibility of their bringing an action for defamation. The Court stated:

> "Subsequently, considering itself bound by the Ohio Supreme Court's decision in Scott, the Ohio Court of Appeals in the instant proceedings affirmed a trial court's grant of summary judgment in favor of respondents, concluding that summary judgment in favor of respondents, concluding that 'it has been decided, as a matter of law, that the article in question was constitutionally protected opinion.' Milkovich v. News-Herald, 46 Ohio App.3d 20, at 23, 545 N. E.2d at, 1324. The Supreme Court of Ohio dismissed petitioner's ensuing appeal for want of a substantial constitutional question. App. 119. We granted certiorari, 493 U.S. ___ (1990), to consider the important

question raised by the Ohio courts' recognition of a constitutionally-required 'opinion' exception to the application of its defamation laws. We now reverse.

"Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements. See L. Eldredge, Law of Defamation 5 (1978).

"In Shakespeare's Othello, Iago says to Othello:

> 'Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.' Act

III, scene 3.'

"Defamation law developed not only as a means of allowing an individual to vindicate his good name, but also for the purpose of obtaining redress for harm caused by such statements. Eldredge, supra, at 5. As the common law developed in this country, apart from the issue of damages, one usually needed only allege an unprivileged publication of false and defamatory matter to state a cause of action for defamation. See, e.g., Restatement of Torts §558 (1938); Gertz v. Robert Welch, Inc., 418 U.S., at 370 (WHITE, J.m dissenting) ('Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt, or ridicule') The common law generally did not place any additional restrictions on the type of statement that could be actionable. Indeed, defamatory communications were deemed actionable regardless of whether they were deemed to be

statements of fact or opinion. See, e.g., Restatement of Torts, supra, §§565-567. As noted in the 1977 Restatement (Second) of Torts §566, Comment a:

> 'Under the law of defamation, an expression of opinion could be defamatory if the expression was sufficiently derogatory of another as to cause harm to his reputation, so as to lower him in he estimation of the community or to deter third persons from associating or dealing with him . . . The expression of opinion was also actionable in a suit for defamation, despite the normal requirement that the communication be false as well as defamatory . . . This position was maintained even though the truth or falsity of an opinion -- as distinguished from a statement of fact -- is not a matter that can be objectively determined and truth is a complete defense to

a suit for defamation.'

"However, due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation.

"'The principle of "fair comment" afford(ed) legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of facts.' 1F, Harper & F. James, Law of Torts §5.28,p. 456 (1956) (footnote omitted). As this statement implies, comment was generally privileged when it concerned a matter of public concern, was upon true or privileged facts, represented the actual opinion of the speaker, and was not made solely for the purpose of causing harm. See Restatement of Torts, supra, §606. 'According to the majority rule, the privilege od fair comment applied only to an expression of

opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion.' Restatement (second) of Torts, supra, §566 Comment a. Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech.

"In 1964, we decided in New York Times v. Sullivan, 376 U.S. 254, that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation. There the Court recognized the need for 'a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" - that is, with knowledge that it was false or with reckless disregard of whether it was

false or not.' 376 U.S., at 279-280. This rule was prompted by a concern that, with respect to the criticism of public officials in their conduct of governmental affairs, a state law "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter protected speech.' Gertz v. Robert Welch, Inc., 418 U.S., at 334 (quoting New York Times, supra, at 279).

"Three years later, in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), a majority of the Court determined 'that the New York Times test should apply to criticism of "public figures" as well as "public officials". The Court extended the constitutional privilege announced in that case to protect defamatory criticism of nonpublic persons "who are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large"'.

Gertz, supra, at 336-337 (quoting Butts, 388 U.S., at 164 (Warren C.J., concurring in result)). As Chief Justice Warren noted in concurrence, '(o)ur citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials"'. Butts, supra, at 164. The Court has also determined that both for public officials and public figures, a showing of New York Times malice is subject to a clear and convincing standard of proof. Gertz, supra, at 342.

"The next step in this constitutional evolution was the Court's consideration of a private individual's defamation actions involving statements of public concern. Although the issue was initially in doubt, see Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), the Court ultimately

concluded that the New York Times malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest. Gertz v. Robert Welch, Inc., supra. As we explained:

> "'Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.
>
> . . . . . .
>
> "'[More important,] public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual.' ID., at 344-345 (Footnote omitted).

"Nonetheless, the Court believed

that certain significant constitutional protections were warranted in this area. First, we held that the States could not impose liability without requiring some showing of fault. See id., at 347-348 ('This approach ... recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation'). Second, we held that the States could not permit recovery of presumed or punitive damages on less than a showing of New York Times malice. See id., at 350 ('Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship...'). Still later, in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), we held 'that the common-law presumption that defamatory speech is false cannot

stand when a plaintiff seeks damages against a media defendant for speech of public concern'. 475 U.S., at 777. In other words, the Court fashioned 'a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages'. Id., at 776. Although recognizing that 'requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so,' the Court believed that this result was justified on the grounds that 'placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result.' Id., at 777-778.

"We have also recognized constitutional limits on the type of speech which may be the subject of state defamation actions. In Greenbelt Cooperative Publishing Ass'n, Inc. v. Bressler, 398 U.S. 6

(1970), a real estate developer had engaged in negotiations with a local city council for a zoning variance on certain of his land, while simultaneously negotiating with the city on other land the city wished to purchase from him. A local newspaper published certain articles stating that some people had characterized the developer's negotiating position as 'blackmail,' and the developer sued for libel. Rejecting a contention that liability could be premised on the notion that the word 'blackmail' implied the developer had committed the actual crime of blackmail, we held that 'the imposition of liability on such a basis was constitutionally impermissible - that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review'. Id., at 13. Noting that the published reports 'were accurate and full', the Court reasoned that 'even the

most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable'. Id., at 13-14. See also Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody which 'could not reasonably have been interpreted as stating actual facts about the public figure involved'); Letter Carriers v. Austin, 418 U.S. 264, 284-286 (1974) (use of word "traitor" in literary definition of a union "scab" not basis for a defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"). The Court also determined 'that in cases raising First Amendment issues ... an appellate court has an

obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgement does not constitute a forbidden intrusion on the field of free expression.'' Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) (quoting New York Times, 376 U.S., at 284-286). 'The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.' Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S., --, -- (1989).

"Respondents would have us recognize, in addition to the established safeguards discussed above, still another First Amendment-based protection for defamatory statements which are categorized as "opinion" as opposed to "fact". For this proposition they rely principally on the following dictum from our opinion in Gertz:

"'Under the First Amendment

> there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.' 418 U.S., at 339-340 (footnote omitted).

"Judge Friendly appropriately observed that this passage 'has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question.' Cianci v. New Times Publishing Co., 639 F. 2d 54,61 (CA 2 1980). Read in context, through, the fair meaning of the passage is to equate the word "opinion" in the second sentence with the word "idea" in the first sentence. Under this view, the language was merely a reiteration of Justice Holmes' classic 'marketplace of ideas' concept. See Abrams v. United

States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ([T]he ultimate good desire is better reached by free trade ideas... the best test of truth is the power of the thought to get itself accepted in the compensation of the market'). Thus we do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled "opinion". See Cianci, supra, at 62, n. 10 (The "marketplace of ideas" origin of this passage 'points strongly to the view that the "opinions" held to be constitutionally protected were the sort of thing that could be corrected by discussion'). Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that expressions of "opinion" may often imply an assertion of objective fact. If a speaker says, 'In my opinion John Jones is a liar.' he implies a knowledge of facts which lead to the

conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, 'In my opinion Jones is a liar,' can cause as much damage to reputation as the statement, 'Jones is a liar.' As Judge Friendly aptly states: '[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think'. See Cianca, supra, at 64. It is worthy of note that at common law, even the privilege of fair comment did not extend to 'a false statement of fact, whether it was expressly stated or implied from an expression of opinion.' Restatement (Second) of Torts,

supra, §566 Comment a.

Apart from their reliance on the Gertz dictum, respondents do not really contend that a statement such as, 'In my opinion John Jones is a liar,' should be protected by a separate privilege for 'opinion' under the First Amendment. But they do contend that in every defamation case the First Amendment mandates an inquiry into whether a statement is 'opinion' or 'fact,' and that only the latter statements may be actionable., They propose that a number of factors developed by the lower courts (in what we hold was a mistaken reliance on the Gertz dictum) be considered in deciding which is which. But we think the 'breathing space' which 'freedoms of expression require in order to survive,' Hepps, 475 U.S., at 772 (quoting New York Times, 376 U.S., at 272), adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact.

"Foremost, we think Hepps stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved.' Thus, unlike the statement, 'In my opinion May Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable. Hepps ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.'

"Next, the Gressler-Letter Carriers-Falwell line of cases provide protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. Falwell, 485 U.S., at 50. This provides assurance that public debate will not suffer for lack of 'imaginative expression' or

the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation. See id, at 53-55.

"The New York Times-Butts and Gertz culpability requirements further ensure that debate on public issues remains 'uninhibited, robust, and wide-open,' New York Times, 376 U.S., at 270. Thus, where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by Gertz'. Finally, the enhanced appellate review required by Bose Corp. provides assurance that the foregoing determinations will be

made in a manner so as not to 'constitute a forbidden intrusion of the field of free expression.' Bose, 466 U.S., at 499 (quotation omitted).

"We are not persuaded that, in addition to these protections, an additional separate constitutional privilege, for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed, 'the clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth'.' Scott, 25 Ohio St.3d, at 251, 496 N. E.2d, at 707. This is not the sort of loose,

figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

"We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false. A determination of whether petitioner lied in this instance can be made on the core of objective evidence by comparing, inter alia, petitioner's testimony before the OSHAA board with his subsequent testimony before the trial court. As the Scott court noted regarding the plaintiff in that case, '[w]hether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing. Unlike a subjective assertion the averred defamatory language is an articulation of an

objectively verifiable event." 25 Ohio St.3d, at 252, 496 N.E.2d, at 707. So too with petitioner Milkovich.'

"The numerous decisions discussed above establishing First Amendment Protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the 'important social values which underlie the law of defamation,' and recognize that '[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation.' Rosenblatt v. Baer, 383 U.S. 75, 86 (1966) Justice Stewart in that case put it with his customary clarity"

> "'The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic

> concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty.
>
> 'The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely discolored.' Id., at 92-93 (Stewart, J., concurring).
>
> "We believe our decision in the present case holds the balance true. The judgment of the Ohio Court of Appeals is reversed and the case remanded for further proceedings not inconsistent with this opinion."

In the instant case, defendants did not couch any of their defamatory statements as being opinion. The Court of Appeal made much of the term "claim" by saying,

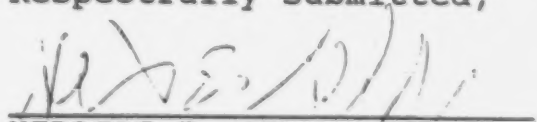
"this is not the first time such a claim has been made". Merely because defendants had previously stated similar things, either orally or in writing, does not indicate that the totality of the statement was opinion, as opposed to a matter of fact. In the last analysis, any defamatory statement would be opinion. However, this is not what was intended in Gertz or in the law of defamation as it evolved. If I say that John Doe is a thief, this would certainly be defamatory and yet it could be claimed that this was merely my opinion; and, of course, it is unless I state facts upon which it is based. In addition to the question of the first amendment protection of opinion, this would add nothing to the law as it presently exists, especially since Milkovich. A fair reading of the decision of the California Court of Appeal (Appendix 1) clearly indicates that they followed the misinterpretation of Gertz as it was distinguished in Milkovich and stated that Milkovich

CONCLUSION

As the State of California, deemed the most popular state in the United States, and being influential in its legal pronouncements throughout other western states and beyond, it is submitted that in this case certiorari should be granted and the matter decided and reversed so that the law, as stated in Milkovich could govern all cases where First Amendment defenses of opinion in defamation would be considered.

As this case involves the defamation by one individual against another, as opposed to a news gathering and reporting source which has special protections under New York Times v. Sullivan, it is especially important that certiorari be granted and the matter then be reversed and sent back for trial in the state courts of California.

Respectfully submitted,



HERBERT E. SELWYN
Attorney for Petitioners

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION ONE

J.W. BIRSNER, et al.,	)	No. B049431
	)	Super.Ct.
Plaintiffs and Appellants	)	No. NOC
	)	9210)
v.	)	
	)	
K. SIVALINGHAM, et al.,	)	
	)	
Defendants and Respondents	)	

APPEAL from a judgment of the Superior Court of Los Angeles County. David M. Schacter, Judge. Affirmed.

Selwyn, Capalbo, Lowenthal & Schacter and Herbert E. Selwyn, for Plaintiffs and Appellants.

Norby & Brodeur, Paul D. Loreto and Cynthia R. Bozzone, for Defendants and Respondents.

App. 2

Plaintiffs J.W. Birsner (Birsner) and Radiology Nuclear Medical Group (RNMG) appeal from the judgment of dismissal entered following the sustaining without leave to amend defendants' K. Sivalingam (Sivalingam), S.K. Sunder (Sunder), and Lancaster Cardiology Medical Group (LCMG) demurrer to the second amended libel and slander complaint for failure to state facts sufficient to constitute a cause of action. (Code of Civil Proc., §430.10, subd. (e).)[1] We conclude the trial court properly sustained the demurrer without leave to amend and affirm.[2]

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[1] Unless otherwise noted, all further statutory references are to the Code of Civil Procedure.

[2] Because we conclude the trial court correctly found the allegedly defamatory statements to be protected expressions of opinion, we need not address defendants' other contentions that the statements were not 'of and concerning' Birsner, and were absolutely or qualifiedly privileged.

FACTS

Birsner's libel and slander complaint was based on an allegedly defamatory May 10, 1988, letter sent by Sivalingam to a Lancaster physician. The receiving physician's relationship to plaintiffs or defendants, other than that they are all physicians within the same community, is unclear. The letter stated "that the qualify of the thallium studies done at Antelope Valley Hospital was substandard," and "in the matter of nuclear cardiology, the Antelope Valley Hospital's performance falls far short.[3]

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[3] Sivalingam's letter stated:

"Dr. Sunder informed me per his conversations with Dr. Kumar, that the quality of the thallium studies done at Antelope Valley Hospital was substandard. This is not the first time such a claim has been made, and I wanted to bring this matter to your attention.

"It might appear that this statement reflects mu own vested interest in the competing facility that I run in my office. May I assure you that this is not

true. We have always tried to support any facility where quality medicine is practiced, and often we understand the need to perform certain studies in certain hospitals or facilities, where we are contractually obliged to do so. May I also bring to your attention that 60% of the cardiology work that is done at the Antelope Valley Hospital is by members of my group. However, in the matter of nuclear cardiology, the Antelope Valley Hospital's performance falls far short.

"In this context, as long as we are consulting on patients, it would be more appropriate to perform these thallium studies in our own facility to assure a quality result. I have in the past, contracted with A.V.I.P.A. to perform noninvasive cardiac studies in our facility. However, I have rarely seen any cases referred recently, but I will make an attempt to contact Steve Penka, so that we may come to some sort of mutual agreement cost wise, to get all noninvasive cardiac studies performed locally.

"I am also told that currently all patients are being sent to Good Samaritan Hospital. I find this quite disturbing, since we can provide as good or better service locally, and I shall again try to meet with the governing body to come to some understanding regarding this."

On June 8, 1988, Sivalingam wrote Birsner, stating:

"Dr. Kumar informed me how much anger and distress my above mentioned letter caused you. I wish to apologize for the

After the defendant's demurrers to the original and first amended complaints were sustained with leave to amend, the trial court sustained defendants' demurrer to plaintiffs' second amended complaint without leave to amend, and later dismissed the case.[4]

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affront and correct myself on some of the statements I made.

"¶ . . . .

"I realize that I should not have used this instance as a reason to categorize Nuclear Cardiology studies at Antelope Valley Hospital as "performance falls short", lack of a "quality result" or "substandard." I do not possess adequate expertise in the field of Nuclear Cardiology, nor have reviewed a sufficient number of cases done at Antelope Valley Hospital to make this claim.

"I am sorry about having made an irresponsible statement and would like to express my apologies for the same.

Both letters were incorporated into the second amended complaint.

[4] The trial court stated: ". . . [Sivalingam] did not say that they are using contaminated test tubes, he did not say they are forging the documents, he did

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not say they are mislabeling, he used the phrase, substandard, which is an opinion . . . ." The court went on to say: "[E]specially in light of medical treatment to make this type of a statement which is an opinion subject to the laws of libel and slander would create, to use again the word[s] of the upper courts, a chilling effect where we wanted to have as much free expression regarding medical treatment of individuals. And this would cause persons to be reticent in giving second opinions if a statement like this was determined to be libel or slander . . . . [¶] . . . I'm tying this into a second opinion. I'm seeing this as a person who has heard different things and makes an opinion feeling that they may be substandard. He didn't say they're negligen[t]. He didn't say they are doing anything fraudulent. He didn't say they are using anything that is contaminated or like the situation with the testing lab that has just be[en] closed down where all their testing procedures were improper and they were sending out the wrong notices to the people. There's nothing here. [¶] There is a wording saying I think I believe this is substandard and you should make your own decision or your own inquiries. It doesn't go to libel and slander. [¶] . . . [¶] I don't want to get into the ambiguity or nonambiquity because I think that's a trap . . . I see it right on its face as an opinion, very similar to a second opinion in a medical case. . . ."

ISSUE

The dispositive issue in this case is whether respondents' allegedly defamatory statements were opinion or fact. If factual, the statements are actionable in libel or slander; if opinion, they constitute protected expression.

DISCUSSION

"'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citations.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to

constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment; if it can be, the trial court has abused its discretion nd we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (Blank v. Kirwan (1985) 39 Cal.3d 311, 318; §452; Foster v. Xerox Corp. (1985) 40 Cal.3d.

Birsner's libel and slander action is based on Sivalingam's allegedly defamatory letter. (Civ. Code, §44.) "Libel is a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a

tendency to injure him in his occupation." (Civ.Code, §45.) "Slander is a false and unprivileged publication, orally uttered . . . which: [¶] . . . [¶] . . . Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits . . . ." (Civ.Code, §46, subd.(3).) "'The sine qua non of recovery for defamation . . . is the existence of a falsehood.' (Letter Carriers v. Austin (1974), 418 U.S. 264, 283.) [¶] The falsehood requirement is grounded in the First Amendment itself. 'Under the First Amendment there is no

such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 339-340, fn. omitted [41 L.Ed.2d 789, 804-805, 94 S.Ct. 2997]; Gregory v. McDonnell Douglas Corp. (1976), 17 Cal.3d 596, 600-601 [131 Cal.Rptr. 641, 552 P.2d 435].) "In this context courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse." (Gregory, supra), 17 Cal.3d at p.601.)" (Baker v. Los Angeles Herald Examiner (1986) 42 Cal.3d 254, 259-260.)

Whether a statement is characterized as opinion or fact is a question of law

to be decided by the court. (Baker v. Los Angeles Herald Examiner, supra, 42 Cal.3d at p.260; Gregory v. McDonnell Douglas Corp., supra, 17 Cal.3d at p.601.) But because the line between the two is difficult to draw. ". . . California courts have developed a 'totality of the circumstances' test to determine whether an alleged defamatory statement is examined. For words to be defamatory, they must be understood in a defamatory sense. [Citations.] . . . [¶] Next, the context in which the statement was made must be considered. . . . [T]he facts surrounding the publication must also be carefully considered. [Citation.] [¶] This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was

directed. [Citation.] . . . [¶] Applying the 'totality of the circumstances' test, this court must determine whether the average reader of Sivalingam's letter] could have reasonably understood the alleged defamatory statement to be one of fact." (Baker v. Los Angeles Herald Examiner, supra, 42 Cal.3d at pp. 260-261.)

Although Birsner asserts that defendants' "expression of opinion" argument has been eliminated by Milkovich v. Lorain Journal Co. (1990) ____ U.S. ____, [111 L.Ed.2d 1, 110 S.Ct. 2695], "Milkovich did not substantially change these principles; it understood that in cases such as this, raising First Amendment issues, a reviewing court must make an independent examination of the whole record in order to ensure that there is no infringement of free

expression. [Citations.]" (Mover v. Amador Valley J. Union High School Dist. (1990) 225 Cal.App.3d 720, 724.)

Appellants, in their second amended complaint, alleged that the phrase, "the quality of the thallium studies done at Antelope Valley Hospital was substandard," was defamatory. The trial court explicitly narrowed the issue to whether the statement "on its face" was an opinion. The court found that the word "substandard" could not be objectively verified within the context of the letter, and therefore, the statement expressed an opinion rather than a fact. Moreover, it considered the potential chilling effect on the "free expression regarding medical treatment of individuals" if courts were to call these statements slanderous and libelous.

Our own examination of the letter

reveals that the allegedly defamatory statement prefaced and closed with opinion-type language. In full text, the first paragraph states: "Dr. Sunder informed me per his conversation with Dr. Kumar, that the quality of the thallium studies done at Antelope Valley Hospital was substandard. This is not the first time such a claim has been made, and I wanted to bring this matter to your attention." (Emphasis added.)

At best, Sivalingam's statement was hearsay and can not be considered a statement of fact. Moreover, Sivalingam's use of the word "claim" expresses opinion. (Dong v. Board of Trustees (1987) 191 Cal.App.3d 1572, 1587 ("[t]he phrases 'I claim that' and 'I consider that' are plainly expressions of opinion.").)

However, "[s]imply couching such

statements [implying false assertions of fact] in terms of opinion does not dispel these implications . . . ." (Milkovich v. Lorain Journal Co., supra, ____ U.S. at p. ____ [110 S.Ct. at p.2706].) Under Milkovich, whether a statement is 'sufficiently factual' depends on 'objective evidence.' (Id, at p. ___ [110 S.Ct. at p. 2707].) Again, Milkovich dud not change California's similar interpretation of existing law. "Indeed, the notion that a statement may be understood as a factual assertion though phrased as an opinion has long been recognized in California. [Citations.]" (Moyer v. Amador Valley J. Union High School Dist., supra, 225 Cal.App.3d at p.723, fn. 4.) Along these lines, appellants argue that negligence, particularly malpractice, is defined as "falling beneath the standard of the

profession in the locality," and is an objectively verifiable factual statement. When Sivalingam called plaintiffs' work "substandard," they argue it was equivalent to calling them "negligent." According to plaintiffs, because "negligence" is factual and objectively verifiable, it is, therefore, defamatory. Plaintiffs also contend that the statement is at least a mixture of fact and opinion and its character should be determined by a jury.

However, plaintiffs failed to show any possible "objective evidence" upon which to gauge Sivalingam's use of "substandard." Sivalingam did not base his remark on any objective standard. Indeed, as the trial court stated, "[Sivalingam] didn't use the word 'negligent.' See, here's the interesting thing, substandard doesn't mean that it's

bad. In order words, we have a lot of levels and we don't even know which standard he's referring to." The letter's context indicates that Sivalingam used his personal standard and, therefore, expressed an opinion. Plaintiffs' argument fails.

Appellants cite Slaughter v. Friedman (1982) 32 Cal.3d 149, and Good Government Group of Seal Beach, Inc. v. Superior Court (1978) 22 Cal.3d 672, in support of their argument that if the average reader could reasonably understand allegedly libelous remarks to be either opinion or fact, a jury must decide the issue. Thus, as previously discussed, the trial court properly sustained the demurrer without leave to amend and dismissed the case.

DISPOSITION

We affirm the judgment.

Defendants are entitled to their costs on appeal.

NOT TO BE PUBLISHED.

ORTEGA, J.

We concur:

SPENCER, P. J.

VOGEL, J.

App. 19

Second Appellate District
Division One
No. 8049431

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

J.W. BIRSNER, Et Al., Appellants

v.

K. SIVALINGAM, Et. Al., Respondents.

Appellants' petition for review DENIED.

LUCAS
Chief Justice

LANCASTER CARDIOLOGY MEDICAL GROUP, INC.
S.K. SUNDER, M.D., F.A.C.C.
K. SIVALINGAM, M.D. E. EKONG, M.D.
A. KUMAR, M.D. K. ROBERTS, PA-C

May 20, 1988

Clayton Reynolds, M.D.
44241 N. 15th St. West
Suite 304
Lancaster, CA 93534

RE: Erb, Richard

Dear Clay:

Dr. Sunder informed me per his conversations with Dr. Kumar, that the quality of the thallium studies done at Antelope Valley Hospital was substandard. This is not the first time such a claim has been made, and I wanted to bring this matter to your attention.

It might appear that this statement reflects mu own vested interest in the competing facility that I run in my office. May I assure you that this is not true. We have always tried to support any facility where quality medicine is practiced, and often we understand the need to perform certain studies in certain hospitals or facilities, where we are contractually obliged to do so. May I also bring to your attention that 60% of the cardiology work that is done at the Antelope Valley Hospital is by members of my group.

43847 North Heaton, Lancaster, CA 93534
(805) 948-7608

However, in the matter of nuclear cardiology, the Antelope Valley Hospital's performance falls far short.

In this context, as long as we are consulting on patients, it would be more appropriate to perform these thallium studies in our own facility to assure a quality result. I have in the past, contracted with A.V.I.P.A. to perform noninvasive cardiac studies in our facility. However, I have rarely seen any cases referred recently, but I will make an attempt to contact Steve Penka, so that we may come to some sort of mutual agreement cost wise, to get all noninvasive cardiac studies performed locally.

I am also told that currently all patients are being sent to Good Samaritan Hospital. I find this quite disturbing, since we can provide as good or better service locally, and I shall again try to meet with the governing body to come to some understanding regarding this.

With Best Wishes,

K. Sivalingam, M.D.
KS/bh

LANCASTER CARDIOLOGY MEDICAL GROUP, INC.
S.K. SUNDER, M.D., F.A.C.C.
K. SIVALINGAM, M.D. E. EKONG, M.D.
A. KUMAR, M.D. K. ROBERTS, PA-C

June 8, 1988

J.W. Birsner, M.D., Sr.
Chairman, Department of Radiology
Antelope Valley Hospital Medical Center
1600 West Avenue J
Lancaster, CA 93534

Re: Letter to Dr. Clayton Reynolds,
dated 05-20-88

Dear Dr. Birsner:

Dr. Kumar informed me how much anger and distress my above mentioned letter caused you. I wish to apologize for the affront and correct myself on some of the statements I made.

Specifically regarding the patient Mr. Richard Erb, the patient had a definitely abnormal exercise treadmill test with development of chest pain and ST segment abnormalities. The patient's redistribution thallium scan was not interpretable, and the reason for this was not known to me until 05-26-88, the date of your formal report. His immediate postexercise scans, however did not show any defects. Since then, the patient has undergone coronary angiography at Good Samaritan Hospital

43847 North Heaton, Lancaster, CA 93534
(805) 948-7608

and found to have a very tight stenosis of the proximal right coronary artery. A successful angioplasty of the lesion was done.

I realize that I should not have used this instance as a reason to categorize Nuclear Cardiology studies at Antelope Valley Hospital as "performance falls short", lack of a "quality result" or "substandard." I do not possess adequate expertise in the field of Nuclear Cardiology, nor have reviewed a sufficient number of cases done at Antelope Valley Hospital to make this claim.

I am sorry about having made an irresponsible statement and would like to express my apologies for the same.

Sincerely yours,

K. Sivalingam, M.D.

KS:ts
cc: C. Reynolds, M.D.
E. Morong, M.D., Chief of Staff
Quality Assurance Committee

PROOF OF SERVICE BY MAIL
(C.C.P. 1013A(3) Revised 1/1/88

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 3580 Wilshire Boulevard, Suite 1510, Los Angeles, California.

On the 24 day of February, 1992, I served the foregoing document, described as PETITION FOR WRIT OF CERTIORARI on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

NORBY & BRODEUR
21535 Hawthorne Boulevard, Suite 200
Torrance, CA 90503

William E. Johnson
1880 Century Park East, Fifth Floor
Los Angeles, CA 90067

I sealed and placed such envelope for collection and mailing to be deposited in the mail on the same day in the ordinary course of business at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California, that the above is true and correct.

Executed this 24 day of February, 1992, at Los Angeles, California.

Lorraine Dores